



## **TESTIMONY FOR THE HOUSE JUDICIARY COMMITTEE**

### **Changing Tides: Exploring the Current State of Civil Rights Enforcement within the Department of Justice**

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**Joseph D. Rich**  
**Director, Fair Housing Project**  
**Lawyers' Committee for Civil Rights Under Law**  
**1401 New York Ave. NW**  
**Washington, DC 20005**  
[jrich@lawyerscommittee.org](mailto:jrich@lawyerscommittee.org)

My name is Joe Rich. Since May, 2005 I have been Director of the Housing and Community Development Project at the Lawyers' Committee for Civil Rights Under Law. Previously I worked for the Department of Justice's Civil Rights Division for almost 37 years. The last six years – from 1999-2005 – I was Chief of the Division's Voting Section. Prior to that, I served as Deputy Chief of the Housing and Civil Enforcement Section for twelve years and Deputy Chief for the Education Section for ten years. During my nearly 37 years in the Division, I served in Republican administrations for over 24 years and Democratic administrations for slightly over 12 years.

I want to thank the Committee for the opportunity to testify at this oversight hearing. Enforcement of our nation's civil rights laws is one of the Department of Justice's most important and sensitive responsibilities, and careful oversight of this work is crucial. For too long, there has been virtually no Congressional oversight during a time in which the Division has strayed seriously from its historic mission and traditions.

Since its creation as a Congressionally mandated unit of the Department of Justice in the Civil Rights Act of 1957, the Civil Rights Division has been the primary guardian protecting our citizens against illegal racial, ethnic, religious, and gender discrimination. Through both Republican and Democratic Administrations, the Division earned a reputation for expertise and professionalism in its civil rights enforcement efforts.

During much of the history of the Division, its civil rights enforcement work has been highly sensitive and politically controversial. It grew out of the tumultuous civil rights movement of the 1960's, a movement which generated great passion and conflict. Given the passions that civil rights enforcement generates, there has always been

potential for conflict between political appointees of the incumbent administration, who are the ultimate decision makers within the Division and the Department, and the stable ranks of career attorneys who are the nation's front line enforcers of civil rights and whose loyalties are to the department where they work. Career attorneys in the Division have experienced inevitable conflicts with political appointees in both Republican and Democratic administrations. These conflicts were almost always resolved after vigorous debate between the career attorneys and political appointees, with both learning from the other. Partisan politics was rarely injected into decision-making, in large measure because decisions usually arose from career staff and, when involving the normal exercise of prosecutorial discretion, were generally respected by political appointees. In a similar fashion, the hiring process for new career employees began with the career staff, who made recommendations to the political appointees that were generally respected.

During the Bush Administration, dramatic change has taken place. Political appointees made it quite clear that they did not wish to draw on the expertise and institutional knowledge of career attorneys. Instead, there appeared to be a conscious effort to remake the Division's career staff. Political appointees often assumed an attitude of hostility toward career staff, exhibited a general distrust for recommendations made by them, and were very reluctant to meet with them to discuss their recommendations. The impact of this treatment on staff morale resulted in an alarming exodus of career attorneys -- the longtime backbone of the Division that had historically maintained the institutional knowledge of how to enforce our civil rights laws tracing back to the passage of our modern civil rights statutes.

Compounding this problem was a major change in hiring procedures which virtually eliminated any career staff input into the hiring of career attorneys. This has led to the perception and reality of new staff attorneys having little if any experience in, or commitment to, the enforcement of civil rights laws and, more seriously, injecting political factors into the hiring of career attorneys. The overall damage caused by losing a large body of the committed career staff and replacing it with persons with little or no interest or experience in civil rights enforcement has been severe and will be difficult to overcome.

In August, 2005, the first article bringing to light the problems in the Civil Rights Division was written by William Yeomans for *Legal Affairs*.<sup>1</sup> Following this, there was a flurry of articles in many newspapers and broadcasts on NPR over a four month period revealing not only the change in personnel and hiring policies in the Division, but also, alarmingly, the crass politicization of decision-making. Constant oversight of the Division is necessary to address these very serious problems.

### **RELATIONSHIP OF POLITICAL APPOINTEES AND CAREER STAFF**

Brian K. Landsberg was a career attorney in the Civil Rights Division from 1964-86 during which he was chief of the Education Section for five years and then chief of the Appellate Section for twelve years. He now is professor of law at McGeorge Law School. In 1997, he published *Enforcing Civil Rights: Race Discrimination and the*

*Department of Justice* (University Press of Kansas), a careful and scholarly analysis of the history and operation of the Division. Landsberg devoted a full chapter to the “Role of Civil Servants and Appointees.” He summarizes the importance of the relationship between political appointees and career staff at page 156:

Although the job of the Department of Justice is to enforce binding legal norms, three factors set up the potential for conflict between political appointees, who represent the policies of the administration then in power, and civil servants, whose tenure is not tied to an administration and whose loyalties are to the department where they work and the laws they enforce: the horizontal and vertical separation of powers; the indeterminacy of some legal norms; and the lack of a concrete client. The vertical separation of powers was designed to enable both civil service attorneys and political appointees to influence policy. *This design, as well as wise policy, requires cooperation between the two groups to achieve the proper balance between carrying out administration policy and carrying out core law enforcement duties. Where one group shuts itself out from influence by the other, the department’s effectiveness suffers.* (emphasis added)

Rather than making efforts to cooperate with career staff, it became increasingly evident during the Bush Administration that political appointees in the Division were consciously walling themselves off from career staff. Indeed, on several occasions there was hostility from political appointees toward those who voiced disagreement with their decisions and policies or were perceived to be disloyal. This was apparent in many ways:

- Longtime career supervisors who were considered to have views that differed from those of the political appointees were reassigned or stripped of major responsibilities. In April, 2002, the employment section chief and a longtime deputy chief were summarily transferred to the Civil Division. Subsequently, a career special litigation counsel in the employment section was similarly transferred. In 2003, the chief of the housing section was demoted to a deputy chief position in another section and shortly thereafter retired. Also in 2003, the chief of the special litigation section was replaced. In the voting section, many of the enforcement responsibilities were taken away from the chief and given directly to supervisors or other attorneys in the section who were viewed as loyal to political appointees. In 2005, the chief of the criminal section was removed and given a job in a training program, and shortly after that, the deputy chief in the voting section for Section 5 of the Voting Rights Act was transferred to the same office. On only one occasion in the past had political appointees removed career section chiefs, and on that occasion it was on a more limited basis. In short, it is rare for political appointees to remove and replace career section chiefs for reasons not related to their job performance. Never in the past had deputy section chiefs been removed by political appointees.
- Regular meetings of all of the career section chiefs together with the political leadership were virtually discontinued from the outset of the Administration. Such meetings had always been an important means of communication in an

increasingly large Division that was physically separated in several different buildings.

- Communication between the direct supervisors of several sections at the deputy assistant attorney general level and section staff also was greatly limited. In the voting section, for instance, section management was initially able to take disagreements in decisions made at the Deputy Assistant Attorney General level to the Assistant Attorney General for resolution. But it became increasingly evident that such debate, which is so important to the healthy development of policy, was frowned on. In 2003, it was made very plain that efforts to raise with the Assistant Attorney General issues on which there was disagreement would be discouraged. In past administrations, section chiefs had open access to the Assistant Attorney General to raise issues of particular importance. Attempts to hold periodic management meetings with political appointees were also usually not acted upon. This resulted in political appointees not receiving the expertise and institutional knowledge of career staff on many matters. Indeed, a political special counsel in the front office was assigned to work solely on voting matters and often assumed many of the responsibilities of the chief of the section.
- Communication between sections was also discouraged. This was especially true when the appellate section was handling the appeals of trial section cases or amicus briefs on the subjects handled by a trial section. When drafting briefs in controversial areas, appellate staff was on several occasions instructed not to share their work with the trial sections until shortly before or when the brief was filed in court. This was extremely frustrating for career staff in both the trial and appellate sections and hindered the adequate development of briefs and full debate of issues in the briefs.
- Political appointees have inserted themselves into section administration to a far greater level than in the past. For example, on many occasions, assignments of cases and matters to section attorneys were made by political employees, something that was a rarity in the past. Moreover, assignment of work to sections and attorneys was done in a way that limited the civil rights work being done by career staff. This was especially true of attorneys in the appellate section, where close to 40% of attorney time was devoted to deportation appeals during 2005.<sup>ii</sup> Similarly, selected career attorneys in that Section were informed that they would no longer receive assignments to civil rights cases, and disfavored employees in other sections were assigned the deportation appeal cases. Political appointees also intruded into the attorney evaluation process in certain instances, something that did not happen in the past.

## **IMPACT ON MORALE OF CAREER EMPLOYEES**

It is hard to overemphasize the negative impact that this type of administration of the Division has had on the morale of career staff. The best indicator of this impact is in the unprecedented turnover of career personnel. It should be noted that the impact has been

greater in some sections than others, and often attorneys in the sections most directly affected by the hostility of political appointees transferred to other sections in which the impact was less. The sections most deeply affected have been voting, employment, appellate, and special litigation.

### **Voting Section**

- Based on a review of personnel rosters in the voting section, 20 of the 35 attorneys in the section (over 54%) have either left the Department, transferred to other sections (in some cases involuntarily), or gone on details since April 2005. During the same period, of the five persons in section leadership at the beginning of 2005 (the chief and four deputy chiefs), only one deputy chief remains in the section today.
- Equally disturbing is the decimation of voting section staff assigned to the important work required by Section 5 of the Voting Rights Act. Prior to the Bush Administration, Section 5 staff was uniformly strengthened, and by 2001 – the year that the new round of redistricting submissions began -- approximately 40% of Section staff was assigned to this work, including a Deputy Section Chief, Robert Berman, who oversaw the Section 5 work; 26 civil rights analysts (including 8 supervisory or senior analysts) responsible for reviewing, gathering facts, and making recommendations on over 4,000 Section 5 submissions received every year; and over six attorneys who spent their full-time reviewing the work of the analysts. Since then, and especially since the transfer of Deputy Chief Berman from the Section in late 2005, this staff dropped by almost two-thirds. There are now only ten civil rights analysts (none of whom hold supervisory jobs and only three of whom are senior) and two full-time attorney reviewers. During my tenure as Section Chief until 2005, I made several requests to fill civil rights analyst vacancies, but these requests were always rejected. It is difficult to understand how this Administration expects to fulfill its Section 5 responsibilities – especially the coming redistricting cycle – with such a reduced staff.

### **Employment Section**

- Based on a review of personnel rosters in the employment section, the section chief and one of four deputy chiefs were involuntarily transferred to the Civil Division in April, 2002. Shortly after that, a special counsel was involuntarily transferred to the Civil Division. And, since then, two other deputy chiefs left the section or retired. Overall, since 2002, the section chief and three of the four deputy chiefs have been involuntarily reassigned or left the section. In addition, in that period, 21 of the 32 attorneys in the section in 2002 (over 65%) have either left the Division or transferred to other sections.
- Loss of paralegals in the employment section has also been significant. Twelve professionals have left, many with over 20 years of experience.

- In the appellate section, since 2005, six of the 12-14 line attorneys in the section transferred to other sections or left the Department. Two of the transfers were involuntary.

There has always been normal turnover of career staff in the Civil Rights Division, but it has never reached such extreme levels and never has it been so closely related to the manner in which political appointees have managed the personnel in the Division. It has stripped the division of career staff at a level not experienced before.

## **HIRING PROCEDURES**

Compounding the impact of the extraordinary loss of career staff in recent years has been a major change in the Division's hiring practices. Since 1954, the primary source of attorneys in all divisions in the Department has been the attorney general's honors program. This program was instituted by then Attorney General Herbert Brownell in order to end perceived personnel practices "marked by allegations of cronyism, favoritism, and graft."<sup>iii</sup> Since its adoption, the honors program has been consistently successful in drawing top law school graduates to the Department.

Until 2002, career attorneys in the Civil Rights Division played the central role in the process followed in hiring attorneys through the honors program. Each year, career line attorneys from each section were appointed to an honors hiring committee which was responsible for traveling to law schools to interview law students who had applied for the program. Because of the tremendous number of applications for the honors program, committee members generally would limit their interviews to applicants who had listed the Civil Rights Division as their first choice when applying. The Civil Rights Division had earned a reputation as the most difficult of the Department's divisions to enter through the honors program because only a few positions were open each year and so many highly qualified law students desired to work in civil rights.

After interviewing was completed, the hiring committee would meet and recommend to the political appointees those who they considered the most qualified. Law school performance was undoubtedly a central factor, but a demonstrated interest and /or experience in civil rights enforcement and a commitment to the work of the Division were the qualities that interviewers sought in candidates selected to join the career staff of the Division. Political appointees rarely rejected these recommendations.

Hiring of experienced attorneys -- so-called "lateral" hires -- followed a similar process. Individual sections with attorney vacancies would review applications and select those to be interviewed. They would conduct initial interviews and the section chief would then recommend hires to Division leadership. Like recommendations for honors hires, these recommendations were almost always accepted by political appointees.

These procedures have been very successful over the years in maintaining an attorney staff of the highest quality – in Republican as well as Democratic administrations. A former Deputy Assistant Attorney General in the Reagan Administration, who was interviewed for a recent *Boston Globe* article about Division hiring practices, said that the system of hiring through committees of career professionals worked well. The article quoted him as saying: “There was obviously oversight from the front office, but I don’t remember a time when an individual went through that process and was not accepted. I just don’t think there was any quarrel with the quality of individuals who were being hired. And we certainly weren’t placing any kind of litmus test on . . . the individuals who were ultimately determined to be best qualified.”<sup>iv</sup>

But, in 2002, these longstanding hiring procedures were abandoned. The honors hiring committee made up of career staff attorneys in the Civil Rights Division was disbanded and all interviewing and hiring decisions were made directly by political appointees with little or no input from career staff or management. As for “lateral” hires, the political appointees similarly took a much more proactive role in selecting those persons who received interviews, and almost always participated in the interviewing process. In my experience as chief of the voting section, section leadership had no input into interviewing or hiring decisions of experienced attorneys.

Not surprisingly, these new hiring procedures have resulted in the resurfacing of the perception of favoritism, cronyism, and political influence which the honors program had been designed to eliminate in 1954. Indeed, information that has come to light recently indicates that in many instances, this is more than perception. In July, 2006, a reporter for the *Boston Globe* obtained pursuant to the Freedom of Information Act the resumes and other hiring data of successful applicants to the voting, employment, and appellate sections from 2001-2006.<sup>v</sup> His analysis of this data indicated that:

- “Hiring of applicants with civil rights backgrounds – either civil rights litigators or members of civil rights groups – have plunged. Only 19 of the 45 [42 percent] lawyers hired since 2003 in the [employment, appellate, and voting] sections were experienced in civil rights law, and of those, nine gained their experience either by defending employers against discrimination lawsuits or by fighting against race-conscious policies.” By contrast, “in the two years before the change, 77 percent of those who were hired had civil rights backgrounds.”
- “Meanwhile, conservative credentials [of those hired] have risen sharply. Since 2003, the three sections have hired 11 lawyers who said they were members of the conservative Federalist Society. Seven hires in the three sections are listed as members of the Republican National Lawyers Association, including two who volunteered for Bush-Cheney campaigns.”

The reporter noted that current and former Division staffers “echoed to varying degrees” that this pattern was what they observed. For example, a former deputy chief in the Division who now teaches at the American University Law School testified at an

American Constitution Society panel on December 14, 2005 that several of his students who had no interest in civil rights and who had applied to the Department with hopes of doing other kinds of work, were often referred to the Civil Rights Division. He said every one of these persons was a member of the Federalist Society.<sup>vi</sup>

Early on in the Bush Administration, the hiring in the voting section was overtly political. In March, 2001, after the contested 2000 election, Attorney General Ashcroft announced a Voting Rights Initiative. An important part of this Initiative was the creation of a new political position – Senior Counsel for Voting Rights – to examine issues of election reform. Two voting section career attorney slots were filled as part of this initiative to help this appointee. The decision to create these new positions was made with no input from career staff and, once the new hires were on board, they operated separately from the voting section on election reform legislation. The person named as the Senior Counsel for Voting Rights was a defeated Republican candidate for Congress. The two line attorneys who filled career attorney slots assigned to the voting section were hired with no input from the section and had been active in the Republican party. One of those “career” attorneys, Hans von Spakovsky, was promoted to a political position in 2003 – special counsel to the Assistant Attorney General. For the two and a half years that this attorney held this position, he spent virtually all his time reviewing voting section work and setting the substantive priorities for the section. Although he was clearly in a political supervisory position, he continued to be listed as a voting section line attorney and enjoyed career status until he received a recess appointment to the Federal Election Commission in December, 2005.

## **CONCLUSION**

During the Bush Administration, there has been an unprecedented effort to change the make-up of the career staff at the Civil Rights Division. This has resulted in a major loss of career personnel with many years of experience in civil rights enforcement and in the invaluable institutional memory that had always been maintained in the Division until now – in both Republican and Democratic administrations. Replacement of this staff through a new hiring process resulted in the perception and reality of politicization of the Division, and high profile decisions in voting matters have added significantly to this. The overall impact has been a loss of public confidence in the fair and even-handed enforcement of civil rights laws by the Department of Justice.

The damage done to one of the federal government’s most important law enforcement agencies is deep and will take time to overcome. Crucial to this effort is careful and continuous Congressional oversight, now and in the future. This is the first House Judiciary committee oversight hearing in at least three years, and until November, 2006 there had not been a Senate Judiciary Committee oversight hearing of the Civil Rights Division for over four years.

The recent revelations concerning the firing of eight United States Attorneys reflect the alarming practices of the Bush Administration’s Department of Justice that first came to light in revelations about the Civil Rights Division. Vigilant oversight is an



absolute necessity to restore the Civil Rights Division and the Department of Justice to the historic role of leading the enforcement of civil rights laws and protection of equal justice under the law.

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<sup>i</sup> See “An Uncivil Division,” *Legal Affairs*, (August-September, 2005). The author of this article, William Yeomans, was a 23 year career Civil Rights Division attorney who had served as Chief of Staff to Assistant Attorney General Bill Lann Lee from 1997 until 2000.

<sup>ii</sup> See Confirmation Hearings for Wan Kim, October, 2005. Answer No. 12 to Written questions of senator Durbin (“According to available records, it is my understanding that during FY 2005, the Appellate Section filed 120 appellate briefs in the Office of Immigration Litigation, and that for the first three quarters of FY 2005 for which information is currently available, approximately 38.8% of attorney hours in the Appellate Section of the Civil Rights Division have been spent on cases regarding the Immigration and Nationality Act.

<sup>iii</sup> Landsberg, *Enforcing Civil Rights* at p. 157.

<sup>iv</sup> Charlie Savage, *Civil Rights Hiring Shifted in the Bush Era*, July 23, 2006 at A1.

<sup>v</sup> *Id.*

<sup>vi</sup> American Constitution Society, *The Role of Political and Career Employees of the U.S. Department of Justice, Civil Rights Division*, December 14, 2005; video available at [www.acslaw.org](http://www.acslaw.org).